

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

1 KRISTIN K. MAYES  
2 Chairman  
3 GARY PIERCE  
4 Commissioner  
5 PAUL NEWMAN  
6 Commissioner  
7 SANDRA D. KENNEDY  
8 Commissioner  
9 BOB STUMP  
10 Commissioner

2010 AUG 18 P 4: 38

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

AUG 18 2010

DOCKETED BY

8 QWEST CORPORATION,  
9 Complainant,  
10 v.  
11 MCLEODUSA  
12 TELECOMMUNICATIONS  
13 SERVICES, INC., d/b/a PAETEC  
14 BUSINESS SERVICES.  
15 Respondent.

DOCKET NOS. T-03267A-09-0307  
T-01051B-09-0307

NOTICE OF FILING

14 In accordance with the direction given by the Administrative Law Judge for the  
15 parties to file notice of significant developments in other jurisdictions related to this  
16 dispute, Qwest Corporation ("Qwest") files the following decision from the Public  
17 Service Commission of Utah:

18  
19 Report and Order – Entered on August 16, 2010, *In the Matter of the Complaint of*  
20 *Qwest Corporation against McLeodUSA Telecommunications Services, Inc., d/b/a*  
21 *PAETEC Business Services, Utah Public Service Commission Docket No. 09-*  
*049-37. (Attached)*

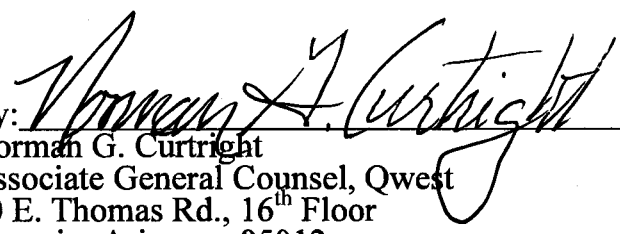
22 By the Report and Order the Utah Public Service Commission grants Qwest's Motion for  
23 Summary Judgment, and holds that the McLeod's charges are unjust and unreasonable.

24  
25  
26

1 The Utah case is nearly identical to the Complaint in this docket.

2 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of August, 2010.

3 QWEST CORPORATION

4  
5 By:   
6 Norman G. Curtright  
7 Associate General Counsel, Qwest  
8 20 E. Thomas Rd., 16<sup>th</sup> Floor  
9 Phoenix, Arizona 85012  
10 Attorney for Qwest Corporation

11 **ORIGINAL** and 13 copies of the foregoing  
12 filed this 28<sup>th</sup> day of August, 2010 with:

13 Docket Control  
14 Arizona Corporation Commission  
15 1200 West Washington Street  
16 Phoenix, AZ 85007

17 **COPY** of the foregoing hand-delivered  
18 this same day to:

19 Sara Harpring  
20 Administrative Law Judge  
21 ARIZONA CORPORATION COMMISSION  
22 1200 West Washington Street  
23 Phoenix, AZ 85007

24 Maureen Scott, Esq.  
25 Legal Division  
26 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

Steve Olea  
Director, Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

1 COPY of the foregoing mailed  
2 this same day to:

3 Michael W. Patten, Esq.  
4 ROSHKA DEWULF & PATTEN, PLC  
5 One Arizona Center  
6 400 East Van Buren Street, Suite 800  
7 Phoenix, Arizona 85004  
8 Attorney for McLeodUSA Telecommunications  
9 Services, Inc., d/b/a Pactec Business Services

10 By: 

11 Brenda S. Studebaker, Litigation Paralegal

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**JEFF HATCH-MILLER**

Chairman

**WILLIAM A. MUNDELL**

Commissioner

**MARC SPITZER**

Commissioner

**MIKE GLEASON**

Commissioner

**KRISTIN K. MAYES**

Commissioner

IN THE MATTER OF THE  
COMMERCIAL AGREEMENT  
BETWEEN QWEST CORPORATION  
AND McLEOD USA  
TELECOMMUNICATIONS SERVICES,  
INC.

DOCKET NOs. T-01051B-05-0273

T-03267A-05-0273

**COMPLIANCE FILING OF AGREEMENT  
UNDER PROTEST AND WITH  
RESERVATION OF RIGHTS**

**I. AGREEMENT FILING**

Pursuant to 47 U.S.C. § 252(e)(1), and the Rules of the Arizona Corporation Commission ("Commission") regarding filing of interconnection agreements and amendments to interconnection agreements, Qwest Corporation ("Qwest") files the attached Master Services Agreement for the provision of Qwest Platform Plus™ ("QPP™") Service entered into between Qwest Corporation and McLeod USA Telecommunications Services, Inc., for approval by the Commission. The attached Agreement shall be referred to herein as the "Commercial QPP Agreement." As explained below, Qwest objects to being required to file the Commercial QPP Agreement

for approval and likewise takes the position that the Commission lacks the authority to review, approve, amend, or reject the Commercial QPP Agreement, in whole or in part. Qwest is therefore filing the attached Commercial QPP™ Agreement under protest and with a reservation of rights as explained below.

## **II. BACKGROUND**

Qwest's filing of the Commercial QPP Agreement under protest is the result of the order entered by the Commission on September 9, 2005 in Docket Nos. T-01051B-04-0540 and T-03574A-04-0540 (the "MCI Filing Order"). In that order, the Commission denied Qwest's Motion to Dismiss the Agreement Filing of MCIMetro Access Transmission Services, L.L.C. ("MCI"). In the MCI Filing Order, the Commission concluded that the Commercial QPP Agreement between Qwest and MCI, and all of the other QPP Agreements that had been consolidated with the MCI docket for the sole purpose of determining whether such agreements should be filed for the Commission's approval under Section 252 of the 1996 Act, are subject to its jurisdiction and that the law required that such agreements be filed for approval by the Commission. The QPP Agreement which is filed herewith was one of the agreements which the Commission determined must be filed under the MCI Filing Order.

The Commercial QPP Agreement filed by Qwest in this docket, with the exception of the name of the party with whom Qwest is contracting to provide QPP Service, is practically identical to the Commercial QPP™ Agreement filed by MCI in Docket Nos. T-01051B-04-0540 and T-03574A-04-0540, and was previously docketed by the Arizona Corporation Commission Staff, assigned the above-referenced Docket No. by Docket Control.

The Commission may be aware that Qwest thus far has filed federal court appeals

in Colorado and Utah, wherein Qwest claims that the decisions of the Colorado and Utah commissions to assert jurisdiction over the Commercial QPP Agreement between Qwest and MCI are unlawful. In both cases, Qwest has sought a declaratory ruling that the commissions' assertions of jurisdiction over the Commercial QPP Agreement are unlawful and for injunctive relief to enforce the Court's decision. Both appeals were filed in December 2004. Given the lack of material factual issues in these appeals, they are likely to be decided in the next few months through rulings on motions for summary judgment. The agreements at issue in the Colorado and Utah appeals are virtually identical to (1) the Commercial QPP Agreement between Qwest and MCI that this Commission concluded must be filed under section 252 and (2) the Commercial QPP Agreement attached hereto. Thus, the results of the decisions in the Colorado and Utah appeals will provide much-needed clarity with regard to the obligation of parties to the Commercial QPP Agreement to file it for approval as well as the authority of state commissions to review, approve, amend, or reject the Commercial QPP Agreement.

### **III. SUMMARY OF QWEST'S LEGAL POSITION**

Given the extensive briefing of Qwest's Motion to Dismiss, Qwest does not intend to provide a detailed legal analysis of its basis for asserting that the parties to the QPP Agreement have no obligation to file it with the Commission for approval and that the [Commission] does not have the authority to review, approve, amend, or reject it. Instead, the following is a brief overview Qwest's position.

Section 252(e) of the Act does not require filing of the Commercial QPP Agreement for approval with state commissions. The decision in *USTA II* became effective on June 16, 2004. In *USTA II*, the D.C. Circuit vacated various rules promulgated by the FCC, including but not limited to the requirement that incumbent

local exchange carriers ("ILECs") unbundle certain network elements pursuant to section 251(c)(3), including switching and shared transport. As stated by the FCC in its *Declaratory Order*, the section 252(e) filing obligation applies to "an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation."<sup>1</sup> Combining the impact of the *USTA II* decision with the FCC's *Declaratory Ruling* regarding section 252(e), there are no section 251(c)(3) obligations upon Qwest to provide switching and shared transport as unbundled network elements, and thus there are no section 252(e) filing obligations associated with the Commercial QPP Agreement. Furthermore, the Commercial QPP Agreement was posted to the Qwest Wholesale website in its entirety and up through January 31, 2005 was available to all carriers that assume all of the terms and obligations assumed by Customer under that Agreement. Finally, Qwest has filed the Commercial QPP™ Agreement with the FCC under 47 U.S.C. § 211(a).

#### IV. FILING UNDER PROTEST

Notwithstanding Qwest's legal position and its objection to filing the QPP™ Agreement, Qwest nonetheless recognizes that the Commission has ruled (1) that the agreement must be filed under section 252 and (2) that the Commission has the authority to review, approve or reject it. The resolution of the conflicting positions of Qwest and the Commission on these issues will likely be determined in the next few months by the courts, or perhaps by the FCC. In the meantime, despite Qwest's strong belief that the

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<sup>1</sup> Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) ("*Declaratory Order*") ¶ 8 (emphasis in original).

MCI Filing Order is not correct,<sup>2</sup> Qwest will comply with the Commission's order by this filing of the QPP Agreement under protest in order to assure that no claim can be made against Qwest that it has failed to make a legally-mandated filing with the Commission.

The filing of the Commercial QPP Agreement by Qwest should not be construed as a waiver of any of the following positions taken by Qwest: (1) that the Commercial QPP Agreement is not subject to sections 251 and 252 of the Act; (2) that neither party to the Commercial QPP Agreement has an obligation to file it with the [Commission]; (3) that the Commission lacks the authority under the Federal Act and/or state law to require the filing of the Commercial QPP Agreement or to review, approve, amend, or reject it, in whole or in part; (4) or any other position consistent with the foregoing positions.

Further, neither the filing of the Commercial QPP Agreement nor the ultimate disposition by the Commission of the request for approval of the Commercial QPP Agreement should be construed as an admission by Qwest that the Agreement must be filed or that the Commission has the authority to review, approve, amend, or reject the Commercial QPP Agreement, in whole or in part.

Finally, depending on the nature of future rulings by the FCC or a federal court on the issues related to the Commercial QPP Agreement, Qwest reserves the right to seek reversal by the Commission of its denial of the motion to dismiss with regard to the MCI QPP Agreement and likewise reserves the right to withdraw its filing of the Commercial QPP Agreement in this docket and to seek that the Commission's disposition of the request for approval of the Commercial QPP Agreement be reversed or vacated.

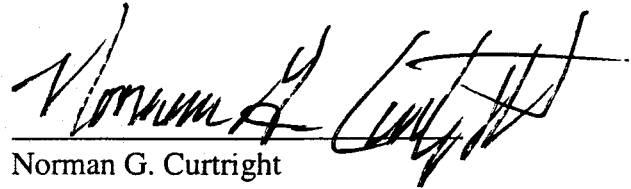
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<sup>2</sup> The basis for Qwest's position is set forth above and as set forth in more detail in its pleadings related to its motion to dismiss the MCI filing the QPP Agreement.



Therefore, subject to the foregoing, Qwest hereby files the attached Commercial QPP™ Agreement under protest and, likewise under protest, seeks the Commission's approval of the Agreement under section 252(e)(1) of the Act.

RESPECTFULLY SUBMITTED this 20 day of Oct, 2005.

A handwritten signature in black ink, appearing to read "Norman G. Curtright", is written over a horizontal line.

Norman G. Curtright  
Corporate Counsel  
4041 N. Central Ave., Suite 1100  
Phoenix, AZ 85012  
Telephone: (602) 630-2187

*Attorney for Qwest Corporation*

Original and 14 copies of the forgoing  
were filed this October 20, 2005 with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

Copies of the foregoing were mailed  
this 20<sup>th</sup> day of October, 2005 to:

Julia Redman-Carter  
Manager, Interconnect Negotiations  
McLeod USA Incorporated  
6400 C, Street SW, Box 3177  
Cedar Rapids, IA 52406

Qwest Corporation  
Director Interconnection Agreements  
1801 California Street, Room 2420  
Denver, Colorado 80202

Qwest Law Department  
Attention: Corporate Counsel, Interconnection  
1801 California Street, 49<sup>th</sup> Floor  
Denver, Co 80202

A handwritten signature in cursive script, reading "Lela Robertson", written over a horizontal line.